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11 UNITED STATES DISTRICT COURT

12 FOR THE DISTRICT OF OREGON

13 PORTLAND DIVISION

14 THRIVE HOOD RIVER, OREGON WILD,
SIERRA CLUB, OREGON NORDIC CLUB,
15 FRIENDS OF MOUNT HOOD, OREGON
KAYAK AND CANOE CLUB, and MIKE
16 McCARTHY,

17 Plaintiffs,

18 v.

19 META LOFTSGAARDEN, Forest
Supervisor for the Mt. Hood National Forest,
20 and the UNITED STATES FOREST
SERVICE,

21 Defendants,

22 and

23 MT. HOOD MEADOWS OREG., LLC,

Defendant-Intervenor.

Case No. 3:22-cv-01981-AR

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO COMPEL COMPLETION
OF THE ADMINISTRATIVE RECORD
AND PRODUCTION OF PRIVILEGE
LOG**

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1 required for APA review. Here, the record is incomplete whether or not allegedly deliberative
2 documents are considered part of that “whole record” and a privilege log is still necessary in this
3 matter whether or not allegedly deliberative documents must be included in that log.

4
5 **I. The presumption of regularity has been overcome and the AR should be
completed with the record materials identified by Plaintiffs.**

6 To overcome the presumption of completeness, Plaintiffs must identify the allegedly
7 omitted documents with “sufficient specificity” and “identify reasonable, non-speculative
8 grounds for the belief that the documents were considered by the agency and not included in the
9 record.” *Oceana, Inc. v. Pritzker*, No. 16-CV_06784-LHK (SVK), 2017 WL 2670733, at *2
10 (N.D. Cal. June 21, 2017) (quoting *Gill v. Dep’t of Justice*, No. 14-CV-03120-RS (KAW), 2015
11 WL 9258075, at *5 (N.D. Cal. Dec. 18, 2015)). Here, Plaintiffs have provided clear evidence
12 that the record is incomplete because the Forest Service omitted from the AR (1) the Clackamas
13 County Comprehensive Plan, (2) non-protected and non-privileged portions of the documents
14 from meetings and discussions from tribal consultations and ongoing communications with
15 tribes, and (3) a video recording of the May 5, 2021, resolution meeting/hearing. ECF 23 at 10–
16 12.

17
18 **a. The Clackamas County Comprehensive Plan**

19 The Clackamas County Comprehensive Plan (the “Plan”) was identified with “sufficient
20 specificity.” ECF 23 at 10–11; ECF 24, ¶9(a). The Service *acknowledges* that it relied on the
21 Plan as part of its decision-making process and does not deny that a copy of the Plan is not
22 currently included in the AR. ECF 29 at 10 (noting that the challenged decision references and
23 hyperlinks to this document); ECF 30 ¶3 (same). This alone rebuts the presumption of

1 completeness. Instead, the Service takes issue with Plaintiffs’ request that a copy of the Plan
2 itself, and not merely a hyperlink, be included as part of the certified AR. ECF 29 at 10–11. The
3 Service implies that it would have to “create a PDF copy of the Plan” which would “create a new
4 record in the litigation.” *Id.* at 11. Plaintiffs are not requesting that the Service “create” anything.
5 The Plan already exists as several PDFs which are available to download from the webpage cited
6 by the Service. It is irrelevant whether the Service had itself downloaded a copy of the Plan in its
7 PDF form (although it should have done so for inclusion in its project file) – the PDFs exist, and
8 the content of the Plan was relied on by the Forest Service in its decision-making process. It is
9 therefore part of the “whole record” for judicial review.

10 The Service states it would not object to “any party’s referencing a new or different
11 hyperlink to the online Plan if the existing hyperlink is changed, expires, or breaks[,]” ECF 29 at
12 11, however, this only addresses potential issues with the *link* itself. It does nothing to ensure
13 that the content *being linked to* has not been changed, removed, or otherwise altered. The
14 webpage linked to by the Service (i.e. <https://www.clackamas.us/planning/comprehensive.html>)
15 is maintained by Clackamas County, not the Forest Service, therefore the Service has no control
16 over the content of that webpage nor the Plan documents linked to. Further, the webpage itself
17 (as of the date of this filing) includes the disclaimer that “Every effort is made to keep this site
18 accurate and up to date, however the current version on file at the offices of the Department of
19 Transportation and Development is the final authority.” At the very least, this underscores the
20 concern that the content and/or documents linked to on that webpage are subject to change.
21 Judicial review must be based upon the “whole record” – this includes documents as they were at
22 the time of the agency decision-making, not just any version of those documents included on a
23 hyperlinked third-party webpage subject to periodic change.

1 **b. Non-Protected and Non-Privileged Tribal Consultation and Communication**
2 **Documents**

3 The Service has acknowledged that at least some records from this category of
4 documents are already included in the AR, ECF No. 29 at 12², implicitly acknowledging that
5 tribal consultation and related documents *were* considered during the decision-making process
6 and are rightly part of the AR. Therefore, the remaining tribal consultation and related
7 documents should also be included in the AR. If all such documents had already been included in
8 the AR, the Service would have indicated this during the parties' conferral, but it made no such
9 assertion, instead arguing that the documents were not relevant to Plaintiffs' claims and/or were
10 protected or privileged. To the extent that the Service is continuing to withhold any *protected*
11 *and/or privileged* documents or portions of documents, those withheld materials should be
12 identified in a privilege log. And to the extent that the Service is continuing to withhold any *non-*
13 *protected and/or non-privileged* documents or portions of documents, those withheld materials
14 should be added to the record now.

15 The Service also argues that the Court should deny Plaintiffs' request to add tribal
16 consultation and communication documents to the AR because Plaintiffs "fail to explain why
17 documents regarding tribal communications are needed for judicial review of *Plaintiffs' claims*."
18 ECF 29 at 11–12 (emphasis added). But whether a defendant thinks certain documents will
19 ultimately relate to a plaintiff's claims has nothing to do with defining the scope of an
20 administrative record. Indeed, whether an AR is complete or not is analyzed completely
21 separately from the nature or scope of a plaintiff's claims; the AR is either complete, or it is not.

22 _____
23 ² The documents identified by the Service in the revised 2024 AR were already part of the
original 2023 AR, therefore they are not "new" documents that were added after Plaintiffs filed
their AR motion.

1 An AR is a defined set of documents – all materials relied upon by the agency in its decision-
2 making process unless otherwise excluded by law. *See Citizens to Pres. Overton Park, Inc. v.*
3 *Volpe*, 401 U.S. 402, 419–420 (1971) (Judicial review under the APA must be based upon the
4 review of the “whole record” developed during the agency’s decision-making process.),
5 *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Thompson v. U.S. Dep’t*
6 *of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (“The ‘whole’ administrative record . . . consists of
7 all the documents and materials directly or *indirectly* considered by agency decision-makers [.]”
8 (internal quotation marks omitted)). Even assuming that the Service’s speculation about how
9 Plaintiffs will ultimately develop their claims is correct, the AR should not be tailored in any
10 way, and documents should not be included nor excluded, based on specific claims brought to
11 challenge a final agency action.

12
13 **c. Video Recording of the May 5, 2021, Objection Resolution Meeting/Hearing.**

14 The Service argues that “the deciding official did not have a recording of the meeting”
15 and “therefore did not, and could not, rely upon the video recording” in reaching their decision.
16 ECF 29 at 13. This ignores the critical fact that the Forest Supervisor, who is and was the official
17 responsible for signing the challenged decision, attended that meeting. So, even if the decision-
18 maker did not specifically rely on the *video* recording of that meeting, they most certainly relied
19 on the content of the discussion of that meeting – objections to the proposed agency action –
20 because that official participated in the Objection Resolution Meeting, which took place during
21 the decision-making process and before the final challenged decision was issued.

22 The Forest Service organized, facilitated, and participated in the May 5, 2021, Objection
23 Resolution Meeting. According to the Service’s own notes, the meeting was attended by nine

1 Forest Service employees, including the decision-making official, Duane Bishop, listed as the
2 “responsible official” and then-acting Forest Supervisor for the Mt. Hood National Forest.³ Rev.
3 AR 49622–26. The video is a recording of that objection resolution discussion, is more complete
4 than the Service’s agenda or notes summarizing the meeting (which *are* included in the AR), and
5 should appropriately be included in the AR. While the Service suggests that it is unsure “whether
6 it is a complete recording of the meeting[,]” ECF 29 at 13, the Service produces no evidence that
7 the recording is materially incomplete, and does not argue that the recording is inaccurate in any
8 way. And in any event, the video is certainly more accurate and complete than the minutes of
9 that meeting, which the Service did include in the AR. If the necessarily limited and incomplete
10 minutes are included in the AR, then the video should also be included. There is no doubt that
11 the Service considered this meeting as part of its decision-making process.

12 Plaintiffs have presented clear evidence overcoming the presumption that the AR is
13 complete. Accordingly, the Court should compel the Service to complete the record with the
14 omitted materials addressed above.

15
16 **II. Plaintiffs need not meet an additional burden to demonstrate that omitted record**
17 **documents are necessary for review of Plaintiffs’ claims or the challenged agency**
18 **decision.**

19 In addition to the requirement that Plaintiffs overcome the presumption of completeness,
20 the Service attempts to impose another burden on Plaintiffs where none exists, demanding that
21 Plaintiffs explain why certain documents are needed for judicial review of Plaintiffs claims, ECF

22
23 ³ Meta Loftsgaarden took over as Ms. Hood National Forest Supervisor after the Objection
Resolution Meeting but before the final decision was issued in 2022. This change in the guard
makes no difference to the analysis.

1 29 at 11–12, or to explain why material is necessary to “adequately review” the challenged
2 agency decision. *Id.* at 13.

3 For the reasons already outlined above, a plaintiff’s specific *claim* should in no way
4 impact the content of an administrative record. The contours of the AR are legally defined by
5 reference to the agency decision-making process itself, not by a plaintiff’s challenge to the
6 ultimate agency decision. Further, if a plaintiff has overcome the presumption of completeness
7 by demonstrating that a sufficiently identified document was considered by the agency yet
8 omitted from the AR, then that party has already demonstrated why that document is necessary
9 for judicial review – because judicial review must be based on the “whole record” – and the
10 record is not “whole” while that document is absent.

11 In support of its position the Service cites to *Xerces Soc’y for Invertebrate Conservation*
12 *v. Shea*, -- F. Supp. 3d--, No. 3:22-cv-790-HZ, 2023 WL 4941221, at *2 (D. Or. July 17, 2023),
13 ECF 29 at 11, 13, which states that “[a] party who moves to supplement or ‘complete’ the record
14 must ‘show that the additional materials sought are necessary to adequately review the
15 [agency’s] decision[.]’” *Id.* (quoting *Fence Creek Cattle v. U.S. Forest Serv.*, 602 F.3d 1125,
16 1131 (9th Cir. 2010)). This is a misreading of the law. There is a significant difference between a
17 motion to “complete” an AR and a motion to “supplement” an AR, and they have different
18 standards.

19 *Fence Creek Cattle* involved supplementation, not completion. There, the District Court
20 had already found the record to be complete, and the court of appeals was discussing the “four
21 narrowly construed circumstances” under which “expansion” or supplementation of that already
22 complete record may be permitted. *Fence Creek*, 602 F.3d at 1131. It was these “additional
23 materials” for which the court required that plaintiffs demonstrate necessity for adequate judicial

1 review, and the “four narrowly construed circumstances” provided the avenues to demonstrate
2 that necessity. *Id.* The *Xerces* court may have been imprecise in its use of language, but that was
3 also an AR supplementation case, not an AR completion case. *Xerces Soc’y*, 2023 WL 4941221
4 at *3–4. To the extent the Service reads *Xerces* as extending the holding in *Fence Creek Cattle* to
5 AR completion motions, the Service is wrong.

6 This is an AR completion motion. Plaintiffs have met their burden under that standard,
7 which is to overcome the presumption of completeness by showing that the materials requested
8 to be included in the AR were part of the “whole record” before the agency before it made its
9 challenged decision. That is all. Plaintiff is not also required to explain how it may eventually
10 use the requested documents in its briefing on the merits. That is not required until summary
11 judgment.

12
13 **III. A privilege log is necessary in this matter whether or not deliberative documents
must be included in that log.**

14 The Service’s argument is that *Blue Mountains Biodiversity Project v. Jeffries et al.*, 72
15 F.4th 991 (9th Cir. 2023) “resolved” the issue of privilege logs in record review cases. ECF 29 at
16 14. However, in reality *Jeffries* merely addressed the propriety of *including deliberative*
17 *documents in a privilege log*. The case expressly did not address the use of privileges logs for
18 documents withheld under privileges *other than* deliberative process. *See Jeffries*, 72 F.4th at 997
19 (“We leave for another day a detailed exploration of the precise circumstances under which a
20 district court can order the production of a privilege log[.]”).⁴

21
22
23 ⁴ Further, the quoted portion of *Xerces* that the Service cites to was regarding the role of
deliberative documents in the administrative record generally; it was not addressing the role of
privilege logs in record review cases. *See* ECF 29 at 14, citing *Xerces Soc’y*, 2023 WL 4941221
at *3. The Service later quotes *Xerces* again for the proposition that absent a “showing of bad

1 Plaintiffs’ Motion asks this court to compel the Forest Service to “prepare and file a
2 privilege log identifying with specificity the documents withheld from the AR on the basis of
3 deliberative process, attorney work product, *or any other privilege*[.]” ECF 23 at 5 (emphasis
4 added).⁵ The Service focuses its Response on why *deliberative* documents should not be
5 included in the AR or on a privilege log. ECF 29 at 14–18. However, beyond its sweeping
6 mischaracterization of *Jeffries*, the Service does not address Plaintiffs’ argument regarding the
7 need for a privilege log to account for *non-deliberative* materials excluded from the record under
8 *any other* claim of privilege.

9 Not all allegedly privileged documents are deliberative. For the reasons already outlined
10 by Plaintiffs (ECF 23 at 12–16), a privilege log is necessary whether or not deliberative
11 documents must be included on that log. Further, even if this Court finds that Fed. R. Civ. P.

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15 faith or improper behavior, this Court recognizes that ‘requiring a privilege log would be without
16 useful purpose and would undermine the limited scope of the Court’s APA review.’” ECF 29 at
17 18, quoting *Xerxes Soc’y*, 2023 WL 4941221 at *4. That quote is missing important context.
18 First, it was pulled from the Court’s discussion that was limited to excluding deliberative
19 documents from privilege logs but did not address documents withheld on *any other claim of*
20 *privilege*. Second, that section of *Xerxes* itself quotes to *Jeffries* which, again, only addressed the
21 intersection of deliberative documents and privilege logs, not all types of privileges. *See Jeffries*,
22 72 F.4th at 997.

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26(b)(5) does not apply to APA cases such as this, at the very least Rule 26(b)(5) offers persuasive authority regarding the propriety and importance of privilege logs in APA matters.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion to Compel Completion of the Administrative Record and Production of a Privilege Log, the Motion should be granted. The requested documents should be added to the AR, and the Forest Service should be instructed to file a privilege log identifying those documents it withheld from the AR due to its unilateral and impenetrable determination that they are "deliberative," and identifying any other documents withheld under any claim of privilege. Even if the Court, under *Jeffries*, declines to compel any action related to allegedly "deliberative" materials, the Court can and should still grant Plaintiffs' Motion as to all non-deliberative materials.

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